SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1129

SFEI, LTD.,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

and

THE CITY OF CERRITOS, *et al.*,

Real Parties in Interest.

VONS GROCERY COMPANY,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

and

THE CITY OF CERRITOS, *et al.*,

Real Parties in Interest.

On Petition for Writ of Certiorari to the California Supreme Court

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BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION

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SUBJECT INDEX

	Page
Preliminary Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	3
Argument	4
1. Compensation for Valid Land Use Regulation	4
2. Compensation for Invalid Land Use Regulation	6
Conclusion	8
Exhibit A. [Modification of Opinion (15 C3d 508, — Cal.Rptr. —, — P.2d —).]	1

BLEED THROUGH

TABLE OF AUTHORITIES CITED

Cases	Page
Berman v. Parker, 348 U.S. 26 (1954)	4, 5
Euclid v. Ambler, 272 U.S. 365 (1929)	4, 5
Goldblatt v. Town of Hempstead, 369 U.S. 590 (1961)	5
Hadacheck v. Sebastian, 239 U.S. 394 (1915)	4
Pennsylvania Coal Co. v. Mahon, 260 U.S. 412 (1922)	5
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	4, 5
Statutes	
California Government Code, Sec. 818.2	2
United States Code, Title 28, Sec. 1257(2)	2
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, Fifth Amendment	3, 4, 5, 6
United States Constitution, Fourteenth Amendment	3
Texts	
Bosselman, The Taking Issue, An Analysis of the Constitutional Limits of Land Use Control, Council on Environmental Quality (U.S. Printing Office, 1973)	4

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BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION.

Preliminary Statement.

This case finds itself before this Honorable Court, even before Real Parties in Interest have had the

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opportunity to file their Answer to the allegations of Petitioners' Complaint. The issues raised herein deal not with what Petitioners must prove as plaintiffs below in order to prevail, but rather assume *ex hypothesi* such proof and demand as relief, remedies which neither this Court, nor the California Supreme Court, nor any other Court of which counsel have knowledge, has ever determined to be constitutionally required.

Opinion Below.

The opinion of the California Supreme Court which Petitioners seek to challenge herein is essentially as is set forth in Exhibit "A" to the Petition for Writ of Certiorari on file herein. For the sake of accuracy, it should be noted, however, that the California Supreme Court did, on December 24, 1975, modify said opinion, at 15 Cal. 2d 837a, in certain respects not pertinent herein. The modification is set out in Exhibit "A" to this Brief so that the Court may be fully advised of the decision of the California Supreme Court.

Jurisdiction.

Real Parties in Interest do not challenge the jurisdiction of the Court under Title 28 U.S.C. §1257(3), but do question the accuracy of Petitioners' assertion of jurisdiction under 28 U.S.C. §1257(2) in that the validity of California Government Code Section 818.2, which provides,

> "[A] public entity is not liable for an injury caused by adopting or failing to adopt an enactment."

was not drawn in question "on the ground of it being repugnant to the Constitution, treaties, or laws of the United States", nor on any other ground whatsoever.

Questions Presented for Review.

The Petition for Certiorari sets out the two issues Petitioners claim are raised by the decision below; in fact, it does so twice—at pages 2-3 in the "Preliminary Statement", and again at pages 3-4 as "Questions Presented for Review"—and each statement of the issues is sufficiently different from the other as to confuse the question of exactly what issues Petitioners are claiming herein.

In an effort at clarity then, Real Parties in Interest restate the two issues attempted to be raised by Petitioners herein as follows:

(1) If a *valid* zoning regulation results in a diminution of property value, is the property owner entitled, under the Fifth and Fourteenth Amendments to the United States Constitution, to be compensated for his loss?

(2) If a zoning regulation prevents a certain use of land and is ultimately determined to be *invalid*, do the Fifth and Fourteenth Amendments to the United States Constitution require that the property owner be compensated for the interim damages suffered while awaiting the judicial declaration of invalidity?

The answer to these issues is, of course, that compensation is not required in either instance, and the California Supreme Court so held.

ARGUMENT.

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be . . . deprived of . . . property, without due process of law; *nor shall private property be taken for public use, without just compensation.*"

1. Compensation for Valid Land Use Regulation.

The classical, and perhaps universal, approach to this "taking issue" as it applies to land use regulation is, and always has been, to invalidate the regulation when it is found that the application or enforcement of the regulation would constitute a "taking" within the meaning of the above-quoted constitutional provision. *See, e.g., Hadacheck v. Sebastian,* 239 U.S. 394 (1915); *Euclid v. Ambler,* 272 U.S. 365 (1929); *Berman v. Parker,* 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). See also, *Bosselman,* The Taking Issue, An Analysis of the Constitutional Limits of Land Use Control, Council on Environmental Quality (U.S. Printing Office, 1973).

Not a single case has been cited to this Court, nor, it is submitted, does any case exist, which holds that rather than invalidating the legislation which allegedly constitutes a taking, a Court should, or may, award money damages as just compensation and permit the otherwise unconstitutional legislation to be enforced. Petitioners recognize in their Petition that there is a total absence of judicial authority for the awarding of compensation as an alternative to the declaring of a particular piece of legislation as invalid and ineffective. Petitioners, however, find themselves in a situation

in today's complex economy where they feel that they would be better off being compensated for the "takings" which they allege to have occurred rather than having their "property" returned to them by way of judicial nullification of the allegedly offending land use regulation.

In order to accomplish this end, the Writ of Certiorari herein attempts to create a *second* test for an "unconstitutional taking" which is separate and distinct from that which our Courts, both State and Federal, have addressed themselves to in the myriad cases where the *validity* of a land use regulation was attacked as an alleged "taking". *Euclid v. Ambler*, 272 U.S. 365 (1929); *Berman v. Parker*, 348 U.S. 26 (1954); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 412 (1922); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1961). Petitioners, recognizing that no basis exists for compensation under the authority of any of the foregoing decisions, postulate the existence of this second "taking" which apparently differs in both kind and quality from that recognized as existing by *any* Court in this nation.

The *second* "taking", as asserted by Petitioners, concedes the validity of the land use regulation involved—that it is not invalid under the foregoing authorities, but alleges that such *valid* regulation so substantially diminishes the value of the land involved, that the Fifth Amendment to our Constitution somehow mandates the payment of compensation for the diminished value of the property. *No authority exists for the payment of such compensation.* Indeed, Petitioners' arguments appear to be not that such compensation

must be paid under the constitutional mandate of the Fifth Amendment, but, rather, that the equities of our modern economy are such that compensation *should* be so provided.

As the California Supreme Court correctly recognized in its decision herein, absent a constitutional mandate that compensation be paid, it is for the legislature to determine the extent to which government shall be liable for any damages which its governing causes its citizens to suffer.

2. Compensation for Invalid Land Use Regulation.

The second aspect of the Petition for Writ of Certiorari herein claims that the Petitioners are somehow constitutionally entitled to damages incurred during that period of time necessary to judicially establish the alleged invalidity of the subject land use regulation. Petitioners assert no basis for distinguishing the sufferance of such damages from the damages suffered by any person or business required to resort to the judicial processes in order to assert or protect a given right, be it constitutional or contractual. The Fifth Amendment of the United States Constitution does not guarantee that a citizen of the United States will never suffer money damages as a result of the action of the federal or any of the state governments; it merely attempts to guarantee that the citizens' property will never be taken without the payment of just compensation.

Again, the damages sought by Petitioners are not those for which compensation is required to be paid by the Constitution, but, rather, are those which Petitioners would have the Court believe are equitably

desirable. It is, of course, unfortunate when government regulation, or government action of any kind, causes a citizen to suffer or to lose dollars. This is so whether the dollars are invested in real estate and lost by virtue of a legislatively enacted land use regulation, or the dollars invested in the stock market and are lost by virtue of the action of some governmental entity, be it the S.E.C. suspending the trading of the stock, or the Food and Drug Administration prohibiting the sale of the company's major product. The fact that it is unfortunate that such monies are lost is, however, a far cry from the conclusion or determination that our Constitution requires that government compensate its citizenry for all dollar damages which it inflicts upon such citizens. This is not the law; indeed, this cannot be the law.

As the California Supreme Court stated in the decision attacked herein (15 Cal. 3d at 519, Petition, at p. 33):

> "Courts have thus recognized that '[o]f course, it is not a tort for Government to govern. . . .' (*Dahlehite v. United States* (1952) 346 U.S. 15, 57 (Jackson, J., dissenting); *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal. 2d 211, 220.) Justice Jackson's mot expresses both a principle of law and a necessity of rational government; both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state. (Cf. *City & County of San Francisco v. Cooper* (1975) 13 Cal. 3d 898; *Fletcher v. Peck* (1810) 10 U.S. (6 Cranch) 87.)"

Conclusion.

By reason of the foregoing premises, and particularly the logical and legal soundness of the decision of the California Supreme Court which stands as its own best defense, Real Parties in Interest respectfully urge that the Petition for Writ of Certiorari herein must be denied.

Respectfully submitted,

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EXHIBIT A.

[Modification of Opinion

(15 C3d 508, — Cal.Rptr. —, — P.2d —).]

[L.A. No. 30382. In Bank. Dec. 24, 1975.]

HFH, Ltd., Petitioner, v. The Superior Court of Los Angeles County, Respondent; City of Cerritos et al., Real Parties in Interest.

[L.A. No. 30383. In Bank. Dec. 24, 1975.]

Von's Grocery Company, Petitioner, v. The Superior Court of Los Angeles County, Respondent; City of Cerritos et al., Real Parties in Interest.

THE COURT.—The opinion herein, appearing at 15 Cal.3d 508, is modified as follows: On page 516, footnote 13, lines 4 and 5, delete the reference to Code Civ. Proc., § 1094.5 and substitute therefor: Code Civ. Proc., § 1085.

On pages 516 and 517, delete the last line in text on page 516 and the first two lines in text on page 517 and substitute therefor: no 'taking' of the property. . . ." (10 Cal.3d at pp. 127-128.)[14]

On page 518, delete line 6 and substitute therefor: value due to zoning action.[15]

On page 518, delete footnote 15 and substitute therefor:

[15]Thus, while we have not hesitated to afford individuals the full measure of the protection indicated by the history of article 1, section 19, no California case has ever interpreted the "or damaged" phrase of our state Constitution to cover mere diminution of market value of property due to zoning action.

On page 520, delete line 12 and substitute therefor: hold that inverse condemnation lies for any zoning action which substantially reduces

On page 521, delete line 30 and substitute therefor: zoning action which results in the substantial diminution of market value. That we

BLEED THROUGH